Supreme Court of the United States

OCTOBER TERM 1940

No. ~~932~~ 48

LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK,

Petitioner,

vs.

A. A. A. HIGHWAY EXPRESS, INC.; H. A. ADAMS, TRADING AS ADAMS TRANSFER CO.; H. L. BASS, AS BASS BUS LINE; SERVICE COACH LINE, INC.; EAST & WEST MOTOR LINES, ROY R. REAGIN, GEORGIA MOTOR EXPRESS, INC., S. S. SALE, SALE TRANSFER CO., SOUTHEASTERN STAGES, INC., EVERREADY CAB COMPANY, J. H. BOOKER, D B A SAVANNAH BEACH LINE AND OR ATLANTIC STAGES; FLETCHER T. KAYLOR, D B A KAYLOR TRANSFER CO.; J. F. MURRAY, D B A GEORGIA ALABAMA COACH LINE; KALER PRODUCE COMPANY, COX BROS. UNDERTAKING CO., INC., ATLANTA MACON MOTOR EXPRESS, INC., SOUTHEASTERN MOTOR LINES, INC., AND OR CEDARTOWN BUS LINE, J. RUSSELL, D B A RUSSELL TRANSFER CO., CONTINENTAL CARRIERS, INC., BATEMAN COMPANY, INC., DOWNIE BROTHERS CIRCUS, KINNETT ODOM COMPANY, INC., SOUTHERN STAGES, INC., WEATHERS BROS. TRANSFER CO., INC., M. & A. MOTOR FREIGHT LINES, INC.,

Respondents.

BRIEF IN OPPOSITION TO GRANT OF WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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Atlanta Natl. Bldg.,
Atlanta, Ga.

A. O. B. SPARKS,

T. BALDWIN MARTIN,
Macon, Ga.,

Of Counsel for Respondents

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Respondents.

BRIEF BY COUNSEL FOR ROY R. REAGAN, GEORGIA MOTOR EXPRESS, INC., S. S. SALE, D/B/A SALE TRANSFER CO., SOUTHEASTERN STAGES, INC., KALER PRODUCE COMPANY, COX BROTHERS UNDERTAKERS, ATLANTA-MACON MOTOR EXPRESS, INC., AND/OR CEDARTOWN BUS LINE, CONTINENTAL CARRIERS, INC., BATEMAN COMPANY, INC., DOWNIE BROTHERS CIRCUS, KINNETT-ODOM COMPANY, INC., SOUTHERN STAGES, INC., UPON THE QUESTION OF PETITION FOR WRIT OF CERTIORARI.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

In response to the petition for certiorari in the above stated case, these respondents respectfully show.

I. STATEMENT OF LEGAL PRINCIPLES INVOLVED

We cordially differ from Counsel for Petitioner as to the actual ruling which was made by the Supreme Court of Georgia in the above stated case.

Insofar as the vital issues in this case are concerned, we interpret the decision of the Georgia Supreme Court (See Record, pages 82 - 96 inclusive), to rule the following:

> "Under the laws of Georgia, the policies of insurance which constitute the basis of plaintiff's action, did not sufficiently set forth either in substance or by reference, either the statute laws of the State of New York, the charter provisions of Auto Mutual Indemnity Company, or the by-laws of said Association, so as to charge the named policyholders with liability under such statutes, charter and by-laws."

We do not agree that the State of Georgia has failed to accord full faith and credit to the laws of New York nor to the assessments as levied by the courts of New York in the Liquidation proceedings. We have admitted throughout this case that the policyholders were bound by the decrees of the New York courts fixing the necessity for assessments and the amounts of assessments but have made the sole contention that the defendants in the court below never did become members of the alleged Insurance Association, and therefore are not liable for assessment as such.

To illustrate that the Supreme Court of Georgia based its decision entirely upon the principle of law that a person cannot become a member of such an association without his own consent, we call attention to the following portions of the decision of the Georgia Supreme Court:

After holding that the insurance contracts were Georgia contracts subject to interpretation by the courts

of this state (See Headnote 4) the court ruled that the references on the back of the policy were not a part of the contract and, taken together with the language in the face of the policy fail to constitute the policyholder as a member of the Association (See Headnote 5).

These defendants do not deny that they are bound by the decisions of the New York courts in determining the amounts of assessments and the necessity therefor and the Supreme Court of Georgia so ruled. (See Record, page 88, headnote 2). Under the decisions there cited, there was still open to such policyholders who were sued in the courts of their respective residences, the question as to whether or not they were in fact members, and liable for any amount whatsoever. On that issue they had never had their day in court (See page 90 of the Record). The first litigation in which that question was raised was the case at bar. In the case at bar defendants, while not denying the necessity for assessments or the amounts thereof, simply contend that they are not members of the Association, for the reason that they never have entered into a contract which made them such a member, and that the policy which they accepted from the Auto Mutual Indemnity Company, did not apprize them of the laws of the State of New York, or the charter or by-laws of the Company, or sufficiently put them on notice that there was any assessment liability to be incurred by them in accepting the policy.

On page seven of the Petition for Writ of Certiorari opposing counsel makes the following statement.

> "The Supreme Court of Georgia held that in a suit brought by the statutory liquidator of an insolvent insurance company for the recovery of assessments against policyholders, recommended by

the liquidator and approved by the domiciliary court, the laws of the forum afford the sole test of liability and the statutes, charter and decrees of the domicile must be disregarded."

A careful study of the decision by the Supreme Court of Georgia will lead to the conclusion that, in its last analysis the Supreme Court of Georgia decided only one question, and the decision of that one question was conclusive upon the entire case. The principle announced in the decision which we consider controlling is the following:

> "A person cannot be made a member or stockholder of a corporation without his consent." (R-90).

The entire decision of the Georgia Supreme Court is based upon the foregoing principle of law. The application of that principle of law to the case in hand is dealt with fully by the Supreme Court, and the ruling of that court is that in the face of the policies involved it did not sufficiently appear that Auto Mutual Indemnity Company was doing business upon an assessment plan, the face of the policy did not provide for assessments, the face of the policy did not make the statutes of New York a part of the policy, nor did the face of the policy make the charter and the by-laws of the Company a part of the policy, as required by the laws of Georgia.

The question of full faith and credit is not involved in the decision of the Supreme Court. Under the ruling of the Georgia Supreme Court, the laws of New York were not properly made a part of the con-

tract, and since not being a part of the contract, such laws could not be enforced against the policyholder, nor could such laws even be put in evidence in the trial of the case in Georgia.

As elsewhere pointed out herein, our contention is that the Supreme Court of Georgia is the final authority to pass upon the construction of the contract, which was issued in Georgia, received in Georgia, to be performed in Georgia, and subject in all respects to be construed by the laws of Georgia.

Opposing counsel insists that the judgments and decrees of the New York courts in the liquidation proceedings are binding upon these defendants in Georgia, and that the refusal by the Supreme Court of Georgia to make such New York decrees a binding judgment in Georgia is a violation of the full faith and credit clause of the constitution. We admit that such decrees of the New York courts are binding upon these defendants provided these defendants became members of the Insurance Association, but the decisions of all the courts are unanimous in holding that such a decree does not adjudicate the persons who are liable therefor, but only adjudicates the necessity for the assessments and the amounts thereof.

> "But the order was not, and did not purport to be, a judgment against anyone. It did not undertake to determine the question whether any particular stockholder was or was not liable in any amount."
>
> *Great Western Telegraph Company, vs. Purday*, 162 *U. S.*, 329.

The Georgia Supreme Court raised this question:

"Was there anything in their contracts with the companies, to-wit, the policies themselves, which constituted them members?" (R-93). The court then points out that the laws of Georgia determine "when and how such laws, when foreign, are to be adopted, and, in all cases not specified, supplies the applicatory law." Citing *Scudder vs. Banks*, 91 *U. S.*, 406, 411. (R-94).

All avenues of thought and discussion of this case lead to one focal point, to-wit, the determination of the question as to whether the policies issued to the defendants constituted them members of a foreign assessment company and their defense is based solely upon their contention that the contract did not make them members. What tribunal shall say whether or not they became members?

II. DECISION OF GEORGIA SUPREME COURT CONSTRUING THE POLICIES IS NOT REVIEWABLE

Georgia Supreme Court held that the policies in question were Georgia contracts, and subject to be construed by the courts of Georgia. On cases sustaining that ruling we refer to Page 93 of the Record. The Supreme Court of Georgia is, therefore, the court of last resort in construing these contracts, and in determining whether the policies constitute the policyholders members of the Insurance Association. Had the Georgia Supreme Court ruled that the defendants, by acceptance of these policies, became members of the Insurance Association, then the sole defense of these policyholders would have been denied them. If the Supreme Court of Georgia had ruled that the statutes of New York were

sufficiently made a part of the contracts of insurance, then the policyholders would have been subject to the provisions of the laws of New York, because such laws were a part of the contract. As to whether such New York laws however, were made a part of the contract, is a question to be decided by the courts of Georgia where the contract was made.

We do not think it will be seriously disputed that the State of Georgia has the right to regulate the manner in which policies shall be issued in this state. As a matter of fact, the State of Georgia has a very definite policy in regard to the issuance of insurance contracts in the State of Georgia, and such public policy of the State of Georgia must be recognized and adhered to by any foreign insurance company, mutual or otherwise, issuing its policies in the State of Georgia. Included among the reasonable regulations of the State of Georgia are the regulations that policies of insurance must be in writing, and also that only such provisions of a policy as are contained in the face of the policy shall be binding upon the policyholder, and provisions placed upon the back of a policy shall not be binding upon the policyholder. As illustrating this legislative and judicial policy existing in Georgia we call attention to certain statutes and decisions of Georgia:

Section 56-213, Civil Code of 1933 Provides:

"Contracts of insurance to be entered into by any company organized under this Chapter shall not be binding unless evidenced by a policy of insurance in writing or print or both, and the liability of said company in case of loss sustained by any policyholder shall be governed by the terms,

stipulations, and conditions appearing *upon the face of the policy*. No policy or other contract of said corporation shall be binding unless it shall be signed by the president or vice-president and secretary or assistant secretary of the company."

Section 56-811, Civil Code of 1933 provides:

"All fire insurance policies issued upon the property of persons within this State, whether issued by companies organized under the laws of this State or by foreign companies doing business in this State, *which contain any* reference to the application for insurance, or the constitution, by-laws, or other rules of the company, either as forming part of the policy or contract between the parties thereto or having any bearing on said contract, shall contain, or have attached to said policy, a correct copy of said application signed by the applicant, and of the constitution, by-laws, and rules referred to; and unless so attached and accompanying the policy, no such constitution, by-laws or rules shall be received in evidence either as part of the policy or as an independent contract in any controversy between the parties to or interested in the said policy, nor shall such application, constitution, by-laws or rules be considered a part of the policy or contract between such parties."

Section 56-904, Civil Code of 1933 provides:

"All life insurance policies issued upon the lives of persons within this State, whether issued by companies organized under the laws of this State or by foreign companies doing business in this State, which contain any reference to the applica-

tion for insurance, or the constitution, by-laws or other rules of the company, either as forming part of the policy or contract between the parties thereto or having any bearing on said contract, shall contain, or have attached to said policy, a correct copy of said application signed by the applicant, and of the constitution, by-laws and rules referred to; and unless so attached and accompanying the policy, no such application, constitution, by-laws or rules shall be received in evidence either as part of the policy or as an independent contract in any controversy between the parties to or interested in the said policy, nor shall such application, constitution, by-laws, or rules be considered a part of the policy or contract between such parties."

Section 56-1502, Civil Code of 1933, relating to assessment insurance companies, provides in part as follows:

"Every policy or certificate issued to a resident of this State by any corporation transacting therein the business of life insurance upon the assessment plan, or admitted into this State under the assessment laws of Georgia, shall print in bold type, in red ink, in every policy or certificate issued upon the life or lives of the citizens of Georgia, making one of the principal lines near the top thereof, the words "issued upon the assessment plan," and the words "assessment plan" shall be printed conspicuously in red ink in or upon every application, circulated, or caused to be circulated by such corporation within this State."

In the case of *Smily vs. Globe Fire Insurance Com-*

pany, 28 *Ga. App.*, 766, the Georgia Court of Appeals said in part:

> "Conditions and stipulations printed on the back of a Fire Insurance policy and not mentioned or referred to on the face of the policy, are not part of the policy or binding on the assured."

We call attention to the decision of the Georgia Supreme Court in the case at bar (Record, page 95-96) to the effect that recitals on the back of the policy were not a part of the policy, and that the "terms of the policy not only failed to put the defendants on notice that he was accepting a policy in a company which was subject to assessments under the laws of the State of New York, but failed in anywise to suggest that the company issuing the policy was an assessment company at all."

All the authorities recognize that the right to assess is based upon the contract but of course the laws can be made a part of the contract also. The courts of New York recognize this principle in *Beha vs. Weinstock*, 160 *N.E., page* 17, where the court said:

> "Every member shall be liable for his proportionate part of any assessment laid by the corporation in accordance with law and his contract."

It will be noted that Section 346 of the Insurance Laws of the State of New York which are pleaded by the plaintiff, provide "the corporation shall in its by-laws and policies fix the contingent mutual liability of the members for the payment of losses and expenses not provided for by its admitted assets." It therefore appears to be also the policy of New York State that the policies shall contain provisions as to contingent liability.

The overwhelming weight of authority in this country is to the effect that provisions on the back of a policy do not become a part of it, particularly when not referred to in the policy itself. Georgia has adopted the same rule.

In the case at bar Georgia Supreme Court said in part:

> "The notation on the back of the policy referred to in the preceding statement of facts was not a part of the policy and therefore not a part of the contract. On the contrary, the policy specifically negatives this. 14 *R. C. L.*, 934. The terms of the policy not only fail to put the defendant on notice that he was accepting a policy in a company which was subject to assessments under the laws of the State of New York, but failed in anywise to suggest that the company issuing the policy was an assessment company at all." (R 96).

The defense set up by these defendants therefore to the effect that they were not made membrs of this association, must be determined in accordance with applicable state law, and there is no Federal question here presented. *Fairport, Painesville & Eastern Railroad Company vs. Meredith*, 292 *U. S.*, 589, 78 *Law Ed.*, 1447.

We see no Federal question involved in this case. Otherwise, however, should there be any Non-Federal question involved which would support the ruling of the Georgia Supreme Court, the latter's ruling upon such Non-Federal questions would be conclusive of the matter and the case would not be reviewable. As said by the United States Supreme Court in *Fox Film Corporation vs. Muller*, 296 *U. S.*, 207:

"The construction put upon the contract did not constitute a preliminary step which simply had the effect of bringing forward for determination the Federal question, but was a decision which automatically took the Federal question out of the case if otherwise it would be there. The Non-Federal question in respect of the construction of the contract and the Federal question in respect of their validity under the Anti-Trust Act were clearly independent of one another. The case in effect was disposed of before the Federal question said to be involved was reached. The decision of that question then became unnecessary: and whether it was decided or not, our want of jurisdiction is clear."

Applying the foregoing principles to the case at bar, it appears that since under the decision of the Georgia Supreme Court the policies of insurance issued in Georgia did not make the policyholders a member of the New York Association, it becomes unnecessary for this court to decide what would have been the rights of the parties had the insurance contracts made the policyholders members of the Association.

It is immaterial whether the public policy of Georgia requiring insurance contracts to be written in the face of the policy are based upon statute law, common law, or elements of public policy as announced by the courts. See *Pennsylvania Railroad Company vs. William Hughes*, 191 *U. S.*, 478, 48 *Law Edition*, 269, where the court said (Headnote 2):

"The highest court of the state may administer the common law according to its own understanding and interpretation, without liability to a re-

view in the Federal Supreme Court, unless some right, title, immunity, or privilege, the creation of the Federal power, has been asserted and denied."

On page 491 of the above decision this court pointed out that the requirements of the particular state involved would be the same "whether enacted into a statute or resulting from the rules of law enforced in the State courts."

The granting of the writ in this case would necessarily mean that this court had consented to review a decision of the Georgia Supreme Court holding that, under the laws of Georgia, the printed matter on the back of the insurance policies in question was insufficient to constitute the policyholders a member of the Insurance Association involved, and we respectfully submit that that question is entirely a question involving the laws and policies of the State of Georgia regulating the issuance of insurance policies, and construing such insurance policies when issued.

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FILE COPY

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Respondents.

On Writ of Certiorari to the Supreme Court of the State of Georgia.

BRIEF OF RESPONDENTS.

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